16

Office - Supreme Court, U.S.
FILED
JAN 31 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 579

JAMES ROBERT BACOM,

Petitioner,

vs.

JAMES A. SULLIVAN, as Sheriff of Dade County, Florida

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Robert H. Givens, Jr.,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Statement of matter involved	1
Jurisdictional statement	3
Questions involved are substantial	3
Questions presented	4
Question number 1	4
Question number 2	5
Reason relied on for allowance of writ	5
Brief in support of petition for writ of certiorari	7
Reference to reports of opinions	7
Jurisdictional Statement	7
Statement of the Case	8
Questions Presented	10
Argument	10
Summary	10
Question No. 1	11
Question No. 2	11
Point No. 1	12
Point No. 2	22
Point No. 3	25
Conclusion	26

Cases Cited

Bacom v. *State*, 338 U. S. 835, 94 L. Ed. 510	2. 9
Bacom v. *Sullivan, Sheriff*, 194 F. (2) 166	7
Cain v. *United States*, 19 F. (2) 472	18
Carter v. *McClaughry*, 22 S. Ct. 181, 193	17
Dreyer v. *Illinois*, 187 U. S. 71, 23 S. Ct. 28	23
Eberling v. *Morgan*, 237 U. S. 625, 35 S. Ct. 710	17
Ex parte Vickery, 51 Fla. 141, 40 So. 77	25
Johnson v. *State*, 27 Fla. 245, 9 So. 208	25
Keerl v. *Montana*, 213 U. S. 135, 29 S. Ct. 469	23
Murphy v. *Massachusetts*, 177 U. S. 155, 20 S. Ct. 639	23
Murphy v. *United States*, 285 F. 806, 816	19

Page

Palko v. *Connecticut*, 58 S. Ct. 149, 302 U. S. 319 ..... 23, 24
Sanford v. *State*, 75 Fla. 393, 78 So. 340 ..... 21, 25
Schroeder v. *United States*, 7 F. (2) 60 18
Southworth v. *State (Fla.)*, 125 So. 345 26
State v. **Bacom**, 30 So. (2) 744, 172 A. L. R. 1050, 2, 3, 7, 9, 13
State v. *Sullivan*, 116 So. 255 20

STATUTES AND TEXTS CITED

Bishop on Cr. Law, Vol. 1, 9th Ed., Sec. 1051, pg. 775 16
Bouvier's Law Dictionary 14
Corpus Juris Secundum, Vol. 22, Cr. Law, Sec. 283, pg. 425 18
Underhill's Cr. Evidence, 4th Ed., Sec. 360, pg. 693 17
Wharton's Cr. Evidence, 11th Ed., Vol. 2, pp. 860, pg. 1483 16
Wharton's Cr. Evidence, Sec. 862 16
Wharton's Cr. Law, Sec. 393 16
Section 317.20, Florida Statutes Annotated 19
Section 860.01, Florida Statutes Annotated 19
Chapter 11975, Laws of Florida, Acts of 1927, Sec. 1 20
Section 12, Declaration of Rights, Constitution of Florida 25
14th Amendment, Constitution of the United States, 2, 3, 8, 10, 11, 23
United States Code Annotated, Title 28, Section 1254, Paragraph 1 ..... 3, 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.

JAMES ROBERT BACOM,

Petitioner,

vs.

JAMES A. SULLIVAN, AS SHERIFF OF DADE COUNTY, FLORIDA,

Respondent

PETITION FOR WRIT OF CERTIORARI

James Robert Bacom respectfully prays for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment of said court entered in the case of *James Robert Bacom* v. *James A. Sullivan,* as Sheriff of Dade County, Florida, on November 25, 1952.

I

Statement of the Matter Involved

Petitioner contends that he was placed in jeopardy twice for the same offense in the Criminal Court of Record in and for Dade County, Florida, and thus denied due process and

equal protection, contrary to the Fourteenth Amendment to the Constitution of the United States.

On August 1, 1946, an automobile driven by petitioner collided with a motorcycle, killing the rider of the motorcycle almost instantly.

On August 5, 1946, an Information was filed in the Criminal Court of Record in and for Dade County, Florida, charging petitioner with (1) operating an automobile "while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired," and (2) operating said automobile recklessly on the occasion of said accident. On August 30, 1946, petitioner entered a plea of guilty to each of said counts in the Court of Crimes for Dade County and thereafter paid a fine and served a three months' jail sentence for said offenses.

Approximately one year later, on August 6, 1947, another Information was filed in the Criminal Court of Record for Dade County charging petitioner with the offense of manslaughter while operating an automobile "while intoxicated." On an appeal by the State from an order of the Criminal Court of Record granting motion to quash this information, the Supreme Court of Florida held that this second Information did not subject petitioner to double jeopardy. *State* v. *Bacom,* 37 So. (2) 744. Petitioner was thereafter tried and convicted on this second Information and sentenced to imprisonment for 56 months. The Supreme Court of Florida affirmed this conviction, *Bacom* v. *State,* 39 So. (2) 794, and the U. S. Supreme Court denied certiorari, 338 U. S. 835, 94 L. Ed. 510.

Petitioner contends that the offense "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired," of which he was convicted under the first Information, is

wholly included in and therefore the same offense as, the offense of "manslaughter while operating an automobile 'while intoxicated'," of which he was convicted under the second Information, and that he was therefore placed in jeopardy twice for the same offense, denying him his liberty without due process of law and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

II

Jurisdictional Statement

The judgment sought to be reviewed was entered by the U. S. Court of Appeals for the Fifth Circuit on November 25, 1952. (R. 36). This petition has been filed within sixty (60) days from that date.

This Court has jurisdiction to review said judgment by certiorari under the provisions of Sec. 1254 (1), U.S.C.A.

III

Questions Involved Are Substantial

The Supreme Court of Florida held (*State* v. *Bacom*, 37 So. (2) 744; *Bacom* v. *State*, 39 So. (2) 794), that petitioner had not been placed in double jeopardy because

> "offenses are not the same if upon the trial of *one* proof of an additional fact is required which is not necessary to be proved in the trial of the other, although some of the same facts may be necessary to be proved in the trial of each." (Emphasis supplied.)

The U. S. Court of Appeals, in its opinion accompanying the judgment sought to be reviewed, said:

> "The recognized test for determining the identity or separateness of offenses charged in two indictments

> is whether or not the same proof will sustain a conviction under both, or whether one required proof of facts not required by the other * * * if one statute requires proof of a fact which the other statute does not, then the offenses are not the same, and a conviction or acquittal under one does not bar a prosecution under the other as double jeopardy."

The questions involved are substantial because if offenses are not the same when proof of an additional fact is required upon the trial of *one* which is not necessary to be proved on the trial of the other, conviction or acquittal of a lesser degree of an offense, wholly included therein, will never bar prosecution on the greater offense and the constitutional prohibitions against double jeopardy will be meaningless. For example, conviction or acquittal of murder in the second degree will not bar prosecution for murder in the first degree, because the additional fact, premeditation, must be proved on the trial for first degree murder.

IV

Questions Presented

Question No. 1

WAS PETITIONER PLACED IN JEOPARDY TWICE FOR THE SAME OFFENSE AND THEREBY DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE 14TH AMENDMENT, WHEN HE WAS SUBJECTED TO PROSECUTION BY THE STATE OF FLORIDA FOR "MANSLAUGHTER WHILE OPERATING AN AUTOMOBILE 'WHILE INTOXICATED'" AFTER HAVING BEEN CONVICTED OF THE OFFENSE AGAINST THE STATE OF "OPERATING AN AUTOMOBILE WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR TO SUCH AN EXTENT THAT HIS NORMAL FACULTIES WERE IMPAIRED," BOTH ACCUSATIONS STEMMING FROM THE SAME OCCURRENCE?

Question No. 2

WAS PETITIONER PLACED IN JEOPARDY TWICE FOR THE SAME OFFENSE AND THEREBY DENIED THE EQUAL PROTECTION OF THE LAWS, IN VIOLATION OF THE 14TH AMENDMENT, WHEN HE WAS SUBJECTED TO PROSECUTION BY THE STATE OF FLORIDA FOR "MANSLAUGHTER WHILE OPERATING AN AUTOMOBILE 'WHILE INTOXICATED'" AFTER HAVING BEEN CONVICTED OF THE OFFENSE AGAINST THE STATE OF "OPERATING AN AUTOMOBILE WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUORS TO SUCH AN EXTENT THAT HIS NORMAL FACULTIES WERE IMPAIRED," BOTH ACCUSATIONS STEMMING FROM THE SAME OCCURRENCE?

V

Reasons Relied On for Allowance of Writ

If this Court does not grant the Writ of Certiorari and overrule the United States Court of Appeals, conviction or acquittal of a lesser degree of an offense, wholly included therein, will never bar prosecution on the greater offense and the constitutional prohibitions against double jeopardy will be meaningless.

Furthermore, the courts of the State of Florida have denied petitioner his liberty without due process of law and also denied him equal protection of the laws by holding that offenses are not the same when proof of an additional fact is required upon the trial of *one* which is not necessary to be proved on the trial of the other, and the United States Court of Appeals has approved this interpretation of the meaning of double jeopardy.

If double jeopardy means what the Supreme Court of the State of Florida and the United States Court of Appeals say it means and their interpretation of its meaning becomes the law of the land, public prosecutors will be able to

persecute individuals and minorities by subjecting them to repeated and successive prosecutions for various degrees of the same offense.

Respectfully submitted,

ROBERT H. GIVENS, JR.,
1036 duPont Building,
Miami, Florida,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.

JAMES ROBERT BACOM,

Petitioner,

vs.

JAMES A. SULLIVAN, AS SHERIFF OF DADE COUNTY, FLORIDA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

For opinions delivered by the lower courts see:
Bacom v. *Sullivan*, 194 F. (2) 166;
State v. *Bacom*, 37 So. (2) 744;
Beacon v. *State*, 39 So. (2) 794.

Opinion delivered by the United States Court of Appeals when it entered the judgment sought to be reviewed is recited in full in Transcript of Record on pages 33-36, inclusive.

Jurisdictional Statement

Petitioner seeks review by certiorari of a judgment entered by the United States Court of Appeals for the Fifth

Circuit in the case of *James Robert Bacom v. James A. Sullivan,* as Sheriff of Dade County, Florida on November 25, 1952.

The petition for writ of certiorari has been filed in this Court within sixty days from the date of said judgment.

Petitioner filed in the United States District Court at Miami, Florida, petition for writ of habeas corpus in which he contended that he had been placed in jeopardy twice for the same offense in the Criminal Court of Record in and for Dade County, Florida, and thus denied due process and equal protection of the laws, contrary to the 14th Amendment to the Constitution of the United States. Writ of habeas corpus issued but it was later discharged by said District Court. The judgment sought to be reviewed affirmed the order discharging said writ of habeas corpus.

This Court has jurisdiction to review said judgment by certiorari under the provisions of Section 1254 (1), USCA.

Statement of the Case

On August 1, 1946 an automobile driven by petitioner collided with a motorcycle, killing the rider of the motorcycle almost instantly. (R. 1)

On August 5, 1946 an Information was filed in the Criminal Court of Record in and for Dade County, Florida, charging petitioner with (1) operating an automobile "while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired" and (2) operating said automobile recklessly on the occasion of said accident. On August 30, 1946 petitioner entered a plea of guilty to each of said counts in the Court of Crimes for Dade County and thereafter paid a fine and served a three months' jail sentence for said offenses. (R. 2)

Approximately one year later, on August 6, 1947 another

Information was filed in the Criminal Court of Record of Dade County charging petitioner with the offense of manslaughter while operating an automobile "while intoxicated." (R. 2) On an appeal by the State from an order of the Criminal Court of Record granting motion to quash this information, the Supreme Court of Florida held that this second Information did not subject petitioner to double jeopardy. *State* v. *Bacom*, 37 So (2) 744. (R. 5) Petitioner was thereafter tried and convicted on the second Information and sentenced to imprisonment for 56 months. The Supreme Court of Florida affirmed this conviction, *Bacom* v. *State*, 39 So (2) 794, and this Court denied certiorari, 338 U. S. 835, 94 L. Ed. 510. (R. 5-6)

Petitioner contended in the courts of the State of Florida and in the lower Federal courts that the offense "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired," of which he was convicted under the first Information, is wholly included in, and therefore the same offense as, the offense of "manslaughter while operating an automobile 'while intoxicated'," of which he was convicted under the second Informaton, and that he was therefore placed in jeopardy twice for the same offense, denying him his liberty without due process of law and equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States.

The Federal questions involved were raised in the Criminal Court of Record in and for Dade County and in the Supreme Court of Florida on an appeal from the judgment of said Criminal Court of Record. Both of said courts decided said questions by ruling that petitioner had not in fact been placed in double jeopardy. See *State* v. *Bacom*, 37 So. (2) 744, and *Bacom* v. *State*, 39 So. (2) 794.

Questions Presented

The following questions are brought forward by the petition for writ of certiorari:

1

Was petitioner placed in jeopardy twice for the same offense and thereby deprived of his liberty without due process of law, in violation of the 14th Amendment, when he was subjected to prosecution by the State of Florida for "manslaughter while operating an automobile 'while intoxicated' " after having been convicted of the offense against the State of "operating an automobile while under the influence of intoxicating liquors to such an extent that his normal faculties were impaired," both accusations stemming from the same occurrence?

2

Was petitioner placed in jeopardy twice for the same offense and thereby denied the equal protection of the laws, in violation of the 14th Amendment, when he was subjected to prosecution by the State of Florida for "manslaughter while operating an automobile 'while intoxicated' " after having been convicted of the offense against the State of "operating an automobile while under the influence of intoxicating liquors to such an extent that his normal faculties were impaired," both accusations stemming from the same occurrence?

ARGUMENT

Summary

Petitioner was first convicted of "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired" (R. 7,

10) and later convicted of "manslaughter while operating an automobile 'while intoxicated' " (R. 13, 19), both accusations stemming from the same occurrence and both offenses being offenses against the State of Florida.

Petitioner contends that the first offense is wholly included in, and therefore the same offense as, the latter offense and that he was therefore placed in jeopardy twice for the same offense, denying him his liberty without due process of law and equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States.

Question No. 1

Was petitioner placed in jeopardy twice for the same offense and thereby deprived of his liberty without due process of law, in violation of the 14th Amendment, when he was subjected to prosecution by the State of Florida for "manslaughter while operating an automobile 'while intoxicated' " after having been convicted of the offense against the State of "operating an automobile while under the influence of intoxicating liquors to such an extent that his normal faculties were impaired," both accusations stemming from the same occurrence?

Question No. 2

Was petitioner placed in jeopardy twice for the same offense and thereby denied the equal protection of the laws, in violation of the 14th Amendment, when he was subjected to prosecution by the State of Florida for "manslaughter while operating an automobile 'while intoxicated' " after having been convicted of the offense against the State of "operating an automobile while under the influence of intoxicating liquors to such an extent that his normal faculties were impaired," both accusations stemming from the same occurrence?

Both questions will be argued simultaneously.

Point No. 1

Petitioner was placed in jeopardy twice for the same offense when he was subjected to prosecution by the State of Florida for "manslaughter while operating an automobile 'while intoxicated' " after having been convicted of the offense against the State of Florida of "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired."

To prove "manslaughter while operating an automobile 'while intoxicated' " the State must prove that the accused was *operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired* when the accident in which a human being was killed occurred, because "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired" is a necessary and essential element of the offense of "manslaughter while operating an automobile 'while intoxicated.' "

To be guilty of "manslaughter while operating an automobile 'while intoxicated' " the accused must necessarily be guilty of every element of the offense of "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired"; for if he was not driving an automobile or was not under the influence of liquor at the time of the accident, he cannot possibly be guilty of killing of a human being in an accident while operating an automobile under the influence of liquor.

If he is acquitted of the offense of "operating an au-

tomobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired" he cannot then be convicted of manslaughter while operating the same automobile under the influence of liquor without simultaneously convicting him of the offense of which he has previously been acquitted.

The offense of "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired" is therefore not only a necessary and essential element of the offense of "manslaughter while operating an automobile 'while intoxicated' " but wholly included therein.

When a person is put on trial for "manslaughter while operating an automobile 'while intoxicated' " he is also put on trial for the lesser offense wholly included therein, to-wit, "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired", and when he is put on trial and convicted of "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired" and then later put on trial for the offense of "manslaughter while operating an automobile 'while intoxicated' " he is actually put on trial twice for the offense of "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired".

The Supreme Court of Florida has held in this case (*State* v. *Bacom*, 30 So. (2) 744) that these two offenses are not the same on the theory that

> "Offenses are not the same if upon the trial of *one* proof of an additional fact is required which is not necessary to be proved in the trial of the other, although some of the same facts may be necessary to be proved in the trial of each." (Emphasis supplied)

The United States Court of Appeals took the same view in the judgment sought to be reviewed. It said:

> "The recognized test for determining the identity or separateness of offenses charged in two indictments is whether or not the same proof will sustain a conviction under both, or whether one required proof of facts not required by the other * * * if one statute requires proof of a fact which the other statute does not, then the offenses are not the same, and a conviction or acquittal under one does not bar a prosecution under the other as double jeopardy."

Offenses are not the same, within the meaning of double jeopardy, if upon the trial of *each* proof of an additional fact is required which is not necessary to be proved in the trial of the other. For example, conviction or acquittal of "assault with intent to commit rape" will not bar prosecution for "assault with intent to commit murder" of the same victim, because one of these offenses is not *wholly included* in the other. In such cases the theory that offenses are not the same if upon the trial of *each* proof of an additional fact is required which is not necessary to be proved in the trial of the other is justified on the ground that the gravamen of the offense of "assault with intent to commit rape", i.e., the part of that charge which weighs most heavily against the accused,[1] is not included in the offense of "assault with intent to commit murder" and, vice versa, the gravamen of the offense of "assault with intent to commit murder" is not included in the offense of "assault with intent to commit rape".

That reasoning, however, cannot be employed to justify the theory that offenses are not the same if upon the trial of *one* proof of an additional fact is required which is not necessary to be proved in the trial of the other, when one of the offenses is *wholly included in* the other, because when

[1] Bouvier's Law Dictionary.

one offense is wholly included in the other the gravamen of the lesser offense is necessarily included in the greater offense. For example, in this case the gravamen of the offense of "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired" is included in the offense of "manslaughter while operating an automobile 'while intoxicated' ". Therefore, when the petitioner was first convicted of "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired" and then put on trial on the manslaughter charge he was put on trial twice for the gravamen of the offense of "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired" and consequently put on trial for the same offense.

If offenses are not the same, within the meaning of double jeopardy, if upon the trial of *one* proof of an additional fact is required which is not necessary to be proved in the trial of the other, one can be prosecuted for murder in the first degree after having been convicted or acquitted of murder in the second degree, or vice versa, because it is necessary to prove premeditation in one case and unnecessary to prove it in the other. In these circumstances, the prohibition against double jeopardy would be meaningless, because conviction or acquittal of lesser degrees of an offense would not bar prosecution for the greater offense and conviction or acquittal of the greater offense would not bar prosecution for any of the lesser degrees of that offense, even though wholly included therein.

The text writers are in agreement that conviction of a lesser offense bars a subsequent prosecution for a greater offense which includes the lesser.

Wharton's Criminal Evidence, 11th Edition, Volume 2, paragraph 860, page 1483, says:

> "*The general rule* as to proving the identity of the offenses so as to support a plea of former jeopardy *is that the offenses must be shown by the accused to be one and the same.* * * * *The test to determine the identity of the second offense is whether or not the evidence necessary to convict in the second case was admissible under the first charge, that it related to the same charge and that it warranted a conviction on the first charge.*" (Emphasis supplied.)

Obviously the evidence necessary to convict appellant of manslaughter "while operating an automobile 'while intoxicated' " was admissible to prove the offense of "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired" and this evidence would have warranted a conviction of that lesser offense.

In Section 862, Wharton's Criminal Evidence goes on to say:

> "Under the doctrine accepted as a part of our jurisprudence, to the effect that the highest offense includes all of the lesser degrees, so long as the judgment of conviction of any degree remains final it can be pleaded in bar of a subsequent prosecution for the same offense *in any degree.*" (Emphasis supplied.)

Wharton's Criminal Law, Section 393, lays down the rule in the following concise statement:

> "A conviction of a lesser offense bars a subsequent prosecution for a greater offense in all those cases where the lesser offense is included in the greater."

Bishop in Criminal Law, Volume 1, 9th Edition, Section 1051, page 775, says:

> "If the two indictments set out like offenses and relate to the same transaction, yet if one contains more

> of a criminal charge than the other but upon it there could be a conviction for what is embraced in the other, the offenses, though of different names are within our constitutional guaranty the same."

Underhill's Criminal Evidence, 4th Edition, Section 360, page 693, says:

> "A conviction or acquittal on the merits, by a court having competent jurisdiction, on a sufficient indictment or information bars a subsequent prosecution against the identical person for the identical offense *or a different degree of the same offense.*" (Emphasis supplied.)

In *Eberling* v. *Morgan* 237 U. S. 625, 35 S. Ct. 710, this court said:

> "If facts which would convict on the second prosecution would not necessarily have convicted on the first, then the first will not be a bar to the second, although the offenses charged may have been committed in the same transaction."

In the case at bar the facts necessary to convict appellant of "manslaughter while operating an automobile 'while intoxicated' " would necessarily have convicted him of the first offense of "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired." Following the reasoning of this court in *Eberling* v. *Morgan*, the two offenses on which appellant has been tried and convicted are the same and conviction of the first offense bars prosecution on the second.

In *Carter* v. *McClaughry*, 22 S. Ct. 181, 193, this Court quoted the following with approval:

> "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon an-

other, *unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act but whether he has been put in jeopardy for the same offense.*" (Emphasis supplied.)

In *Schroeder* v. *United States*, 7 F. (2) 60, the Court said:

> "And the law is settled that where a person is tried and convicted of a crime which has various incidents included in it he cannot thereafter be tried and punished for an offense consisting of one or more of such incidents. To do so would be to inflict double punishment. In re: Nielson, 131 U. S. 176, 185: 9 S. Ct. 672; United States v. Hampden, 294 F. 345, 348."

In *Cain* v. *United States*, 19 F. (2) 472, the court said substantially the same thing in the following language:

> "We think the true rule, deducible both from the cases and the reason of the thing, is that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense."

The last two cases support the doctrine that conviction or acquittal of an offense bars subsequent prosecution for the same offense *in any degree*, greater or lesser.

As Corpus Juris Secundum, in Volume 22, Criminal Law, Section 283, page 425, says, it is "the almost universally accepted doctrine that an acquittal or a conviction for a minor offense included in a greater will bar a prosecution for the greater, if on an indictment for the greater accused could be convicted of the lesser."

Respondent contends that "operating an automobile while under the influence of intoxicating liquor to such an

extent that his normal faculties were impaired'' is only a traffic violation and therefore cannot be considered a lesser degree of the offense of ''manslaughter while operating an automobile 'while intoxicated'.'' It is true that Section 317.20, Florida Statutes Annotated, defining the offense of ''operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired,'' is included in the chapter of Florida Statutes entitled ''Regulation of Traffic on Highways'' and that Section 860.01, Florida Statutes Annotated, defining the offense of ''manslaughter while operating an automobile 'while intoxicated' '' is included in another chapter of the Florida Statutes entitled ''Offenses concerning Motor Vehicles and Railroad Trains.'' We submit, however, that this has nothing to do with a determination as to whether one offense is wholly included in the other and therefore a lesser degree of same, or not. If the Florida Legislature can defeat the constitutional prohibition against placing a person in jeopardy twice for the same offense by defining separate offenses in different chapters, it could accomplish the same thing by defining both offenses in the same chapter and merely saying one shall not be construed as a lesser degree of the other. Yet if the evidence shows that one is in fact a lesser degree of the other, such a statutory effort to defeat the constitutional right to be exempt from double jeopardy would be held unconstitutional. As the Court said in *Murphy* v. *United States*, 285, F. 801, 816, the correct test must be practical and not theoretical and must be based on the facts or the evidence and not on some theory of the pleader.

We submit that both offenses are actually traffic violations but, whether or not this is true, the fact remains that one is a necessary and essential element of the other and

wholly included therein. Both offenses are therefore the same within the meaning of double jeopardy.

The respondent also contends that conviction in the Court of Crimes of Dade County of "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired" does not bar conviction in the Criminal Court of Record of Dade County of "manslaughter while operating an automobile 'while intoxicated'."

The Court of Crimes was created by Chapter 11975, Laws of Florida, Acts of 1927. Section 1 thereof, which defines its jurisdiction, says:

> "* * * The said Court shall have concurrent original jurisdiction with the Criminal Court of Record of said county in all cases of misdemeanors."

The first Information, charging appellant with "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired" was filed in the Criminal Court of Record of Dade County (R. 7, 9). It was tried in the Court of Crimes because the Court of Crimes has concurrent jurisdiction with the Criminal Court of Record of all misdemeanors and the Criminal Court of Record has jurisdiction of all felonies not punishable by death. *State* v. *Sullivan*, 116 So. 255. The second Information, charging appellant with "manlaughter while operating an automobile 'while intoxicated' " was filed and tried in the Criminal Court of Record (R. 12).

Offenses are not the same, within the meaning of double jeopardy, if they are offenses against different governmental authorities, even though they may otherwise be the same. For example, the offense against the federal govern-

ment of transporting a stolen automobile in interstate commerce and the offense against the state government of stealing that automobile are not the same because they are offenses against separate and distinct governmental authorities. Similarly, the offense against the state laws of reckless driving is not the same offense as the offense against the laws of the City of Miami of reckless driving. But the offense against the State of Florida of "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired" is the same whether it is tried in the Court of Crimes of Dade County or the Court of Crimes of Hillsborough County. The offense is not against the court but against the state and no person can be put in jeopardy twice for the same offense even by different courts.

It was contended in *Sanford* v. *State*, 75 Fla. 393, 78 So. 340, that the offense of assault with intent to commit rape was not the same offense as rape (though wholly included therein) because the offense "assault with intent to commit rape" was tried in the Criminal Court of Record which did not have jurisdiction of the offense "rape" and the offense "rape" was triable only in the Circuit Court. The court held that this contention was without merit.

If offenses are not the same, even though one is wholly included in the other, just because one court has jurisdiction of one offense and another court has jurisdiction of the other, conviction of second degree murder would not bar prosecution for first degree murder, or acquittal of first degree murder would not bar prosecution for second degree murder, because the Circuit Court of Dade County has jurisdiction of first degree murder and the Criminal Court of Record has jurisdiction of second degree murder.

In commenting on this question in *Sanford* v. *State*, supra, the Supreme Court of Florida said:

"To hold that a conviction or acquittal, in order to be a bar to another prosecution, must be for an offense of a higher degree, necessarily including the offense for which the accused stands indicted would subject the accused to a prosecution for each of the lesser offenses included in a higher and finally a prosecution for the highest, which embraced all the lower grades, thereby putting the accused in jeopardy several times for one or more of the lesser offenses. It is a rule too well recognized to require citation of the authorities that penal laws should be strictly construed, and those in favor of the accused should receive a liberal construction. Applying this fundamental principle to the constitutional provision involved, the sole purpose of which is to protect the accused from more than one prosecution for the same offense, *the result is to prohibit the state, which has the right to elect the charge to prefer against the accused as well as the forum, from first prosecuting the lower offense necessarily included in a higher and then prosecuting the higher.*" (Emphasis supplied)

Point No. 2

Petitioner was denied his liberty without due process of law, in violation of the 14th Amendment, when he was placed in jeopardy twice for the same offense.

The 14th Amendment to the Constitution of the United States says that no state shall deprive a person of his liberty "without due process of law".

"Due process of law" means, among other things, reasonable and faithful observance of and adherence to those rules and principles of law and justice which make up and govern our system of jurisprudence.

A cornerstone of our system of jurisprudence, so far as private rights are concerned, is the ancient and immutable

law that no person shall be twice put in jeopardy for the safe offense. This universal law of private rights, in force wherever men of justice, reason and conscience prevail, was expressed in several maxims of the Common Law and codified in every constitution adopted in this land of ours.

Although cognizance was taken of many legal wrongs, in the Magna Charta and in our Declaration of Independence, the lack of mention of double jeopardy in those documents indicates that even tyrants never placed people in jeopardy twice for the same offense.

The prohibition against placing a person in jeopardy twice for the same offense is therefore one of the most important rules and principles of law and justice which make up and govern our system of jurisprudence. Without such a rule *our* civil and political institutions could not endure.

In several cases this court has taken jurisdiction of cases in which it was contended that persons had been denied "due process of law" in violation of the 14th Amendment by being placed in jeopardy twice for the same offense. See *Palko* v. *Connecticut*, 58 S. Ct. 149, 302 U. S. 319; *Keerl* v. *Montana*, 213 U. S. 135, 29 S. Ct. 469; *Murphy* v. *Massachusetts*, 177 U. S. 155, 20 S. Ct. 639; and *Dreyer* v. *Illinois*, 187 U. S. 71, 23 S. Ct. 28. In all of these cases this court held that the defendants had not been placed in jeopardy twice for the same offense and consequently had not been denied "due process of law" in violation of the 14th Amendment.

It is true that there does not appear to be a case in which the Supreme Court of the United States has held that placing a person in jeopardy twice for the same offense violates the due process clause of the 14th Amendment, but it does not necessarily follow that placing a person in jeopardy twice for the same offense does not violate the due process

clause just because this is true. In *Palko* v. *Connecticut*, 302 U. S. 319, 58 S. Ct. 149, cited above, this court said:

> "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? * * * The answer surely must be 'no'. What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him we have no occasion to consider. We deal with the statute before us and no other."

We submit that it violates the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" to try, convict and punish a person for one offense after he has previously been tried, convicted and punished for another offense which is a necessary and essential element of the latter offense and wholly included therein. If a person can be prosecuted for "manslaughter while operating an automobile 'while intoxicated' " after having been convicted or acquitted of "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired" (both offenses arising out of the same incident, of course), there is no reason at all why a person convicted or acquitted of second degree murder cannot be prosecuted for first degree murder because prosecution for first degree murder is barred by conviction or acquittal of second degree murder only because the latter offense is a necessary and essential element of the former and wholly included therein.

Point No. 3

Petitioner was denied the equal protection of the laws, in violation of the 14th Amendment, when he was placed in jeopardy twice for the same offense.

Section 12 of the Declaration of Rights of the Constitution of Forida says that

> "No person shall be subject to be twice put in jeopardy for the same offense, * * *".

In construing the meaning of that provision of the Florida Constitution the Supreme Court of Florida has held on numerous occasions in the past that conviction or acquittal of a lesser degree of an offense, wholly included in the greater offense, bars prosecution for the greater offense. Yet in this case the Florida courts have denied appellant the same protection of the laws it has thus afforded to other persons in similar circumstances, in violation of the 14th Amendment to the Constitution of the United States.

Typical of the cases in which the Supreme Court of Florida has so held are the following:

Johnson v. *State*, 27 Fla. 245, 9 So. 208

> In which the court held that conviction of second degree murder barred prosecution on a charge of first degree murder;

Ex parte Vickery, 51 Fla. 141, 40 So. 77

> In which the court held that conviction of manslaughter barred prosecution on a charge of first degree murder;

Sanford v. *State*, 75 Fla. 393, 78 So. 340

> In which the court held that conviction, on a plea of guilty, of assault and battery under an informa-

tion charging the defendant with assault with intent to commit rape barred prosecution on a charge of rape; and

Southworth v. *State* (Fla.), 125 So. 345

In which the court held that conviction of robbery would have barred prosecution for murder effected while committing the robbery *if the victim had died before the accused was convicted of robbery.*

We submit that the district court erred when it refused to discharge appellant permanently from the custody of appellee and entered the order discharging the writ of habeas corpus, because clearly appellant has been denied the same protection of the laws which has been afforded to other persons in Florida in similar circumstances.

Conclusion

Petitioner was placed in jeopardy twice for the same offense when he was subjected to prosecution by the State of Florida for "manslaughter while operating an automobile 'while intoxicated' " after having been convicted of the offense against the State of "operating an automobile while under the influence of intoxicating liquor to such an extent that his normal faculties were impaired".

Having been placed in jeopardy twice for the same offense, he was

(a) deprived of his liberty without due process of law in violation of the 14th Amendment to the Constitution of the United States; and

(b) denied the equal protection of the laws of Florida in violation of the 14th Amendment to the Constitution of the United States.

The United States Court of Appeals therefore erred when it entered its judgment on November 25, 1952 affirm-

ing the order of the United States District Court which dicharged the writ of habeas corpus.

Respectfully submitted,

ROBERT H. GIVENS, JR.,
1036 duPont Building
Miami, Florida
Attorney for Appellant.

(6105)